Filed 3/26/19 Walker v. Marin Municipal Water Dist. CA1/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

ANNE WALKER, Plaintiff and Respondent, v. MARIN MUNICIPAL WATER DISTRICT, Defendant and Appellant.	A152048 (Marin County Super. Ct. No. CIV-1501914)

Respondent Anne Walker, a resident served by appellant Marin Municipal Water District (District), challenges the formula the District uses to calculate residential water rates. The trial court dismissed her complaint on the basis that she had failed to exhaust her administrative remedies, but it later granted her motion for a new trial after the Fourth Appellate District decided *Plantier v. Ramona Municipal Water Dist.* (2017) 12 Cal.App.5th 856 (*Plantier*). Because we agree with *Plantier* that ratepayers are not required to exhaust administrative remedies before challenging formulas used to calculate rates imposed under Proposition 218, we affirm.

I.
FACTUAL AND PROCEDURAL BACKGROUND

California voters in 1996 passed Proposition 218, which added articles XIII C and XIII D to the California Constitution. (*Paland v. Brooktrails Township Community Services Dist. Bd. of Directors* (2009) 179 Cal.App.4th 1358, 1365.) Article XIII D limits the ability of local governments to impose assessments, fees, and charges. (*Pajaro*

Valley Water Management Agency v. Amrhein (2007) 150 Cal.App.4th 1364, 1378.) Section 6 of Article XIII D (hereafter "section 6") provides a detailed procedure that local government agencies, including water districts such as the District, must follow to impose or increase "[p]roperty [r]elated [f]ees and [c]harges." (See also art. XIII C, §§ 1, subd. (b), 2, subd. (d).) As set forth in further detail below, subdivision (a) of section 6 provides a procedure for imposing new or increased fees and charges. Subdivision (b) of section 6 imposes requirements for new and increased fees and charges, as well as fees and charges that existed at the time of the passage of Proposition 218.

To promote water conservation, the District uses a four-tiered rate system for residential customers that charges more per unit as a customer's usage increases. Although the tiered-water structure and the merits of Walker's challenge to this structure are complex, the facts underlying the current dispute are straightforward and undisputed.

In 2011 and 2012, the District imposed across-the-board rate increases but did not change the underlying tiered-rate structure. The parties agree that the District complied with the procedural requirements of section 6, subdivision (a), in imposing these increases and that Walker did not attend any of the public hearings held under the statute or protest the increases in any way.

In April 2015, Walker filed a claim against the District challenging the constitutionality of the District's tiered-rate structure because the rates are allegedly not based on cost of service as required by section 6, subdivision (b)(1). The District rejected the claim the following month, and Walker filed this class action lawsuit in August 2015. In it, she sought a petition for a writ of mandate and a declaration that the District's rate structure violates Article XIII D and that the District failed to comply with section 6, subdivision (b). In its answer, the District asserted that Walker had failed to exhaust her administrative remedies.

After the District certified the administrative record, Walker filed a memorandum supporting her claims. In its opposition, the District argued that Walker had failed to exhaust her administrative remedies and that her action therefore was barred. The trial

court agreed with the District, denied the petition for a writ of mandate, and entered judgment in the District's favor on April 21, 2017.

Walker filed a motion for a new trial. While the motion was pending, Division One of the Fourth Appellate District filed *Plantier, supra*, 12 Cal.App.5th 856, which held that ratepayers challenging the method of calculating wastewater service fees (as opposed to the amount of fees) were not required to exhaust administrative remedies under section 6 before filing suit. (*Id.* at pp. 859-860.) Following *Plantier*, the trial court granted Walker's motion for a new trial. The District appealed, and Walker filed a protective cross-appeal from the original judgment.

The Supreme Court granted review in *Plantier* on September 13, 2017 (S243360). The District filed a motion in this court requesting a stay until *Plantier* was decided, the court denied the request, and briefing proceeded. The Howard Jarvis Taxpayers Association filed an amicus curiae brief in support of Walker; and the Association of California Water Agencies, the California Association of Sanitation Agencies, the California Special Districts Association, the California State Association of Counties, and the League of California Cities filed an amicus curiae brief in support of the District.

II.
DISCUSSION

The sole question we must decide is whether this action is barred because Walker failed to exhaust her administrative remedies, a question we review de novo. (*Plantier, supra*, 12 Cal.App.5th at p. 865.) We agree with *Plantier* that a challenge to the method of calculating rates is not barred by a failure to exhaust administrative remedies under section 6, and we therefore affirm the trial court's motion granting a new trial.

Because *Plantier* is directly on point and disposes of the issue raised on appeal, we quote it at length: "When an applicable statute, ordinance, or regulation provides an *adequate* administrative remedy, a party must exhaust it before seeking judicial relief. [Citations.] 'Exhaustion requires "a full presentation to the administrative agency upon all issues of the case and at all prescribed stages of the administrative proceedings." ' " (*Plantier, supra*, 12 Cal.App.5th at p. 865.) "The exhaustion requirement is subject to

exceptions, one of which is where the administrative remedy is inadequate. [Citation.] The statute, ordinance, regulation, or other written policy establishing an administrative remedy must provide clearly defined procedures for the submission, evaluation, and *resolution* of disputes. [Citations.] A policy that only provides for the submission of disputes to a decision maker without stating whether the aggrieved party is entitled to an evidentiary hearing or the standard for reviewing the prior decision is generally deemed inadequate. [Citation.] An administrative remedy that fails to satisfy these and other requirements need not be exhausted." (*Id.* at p. 866.)

To determine whether Walker was required to exhaust her administrative remedies in connection with her challenge to the District's four-tier system to determine water fees, we look at the language of section 6. Subdivision (a) is titled "Procedures for New or Increased Fees and Charges." It provides that before an agency may impose or increase any fee or charge, it must identify the parcels upon which a fee or charge is proposed; calculate the amount of the fee or charge; provide written notice by mail of the proposed fee or charge to the record owner of each identified parcel, the basis upon which the amount of the proposed fee or charge was calculated, the reasons for the fee or charge, and the date, time, and location of a public hearing on the proposed fee and charge; conduct a public hearing on the proposed fee or charge not fewer than 45 days after mailing notice; and consider all protests against the proposed fee or charge at the hearing. (§ 6, subd. (a)(1)-(2).) "If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge." (§ 6, subd. (a)(2).) The District recounts at length in its opening brief the steps it took to comply with section 6, subdivision (a), when it raised water rates in 2011 and 2012, but Walker does not claim the District failed to comply with subdivision (a).

Section 6, subdivision (b), is titled "Requirements for Existing, New or Increased Fees and Charges." It sets forth five requirements for all fees or charges that an agency extends, imposes, or increases: (1) revenues from the fee or charge shall not exceed the funds required to provide the property-related service, (2) revenues from the fee or charge

shall not be used for any purpose other than that for which it was imposed, (3) the amount of a fee or charge imposed as an incident to property ownership shall not exceed the proportional cost of the service attributable to the parcel, (4) the fee or charge may not be imposed for a service unless the service is actually used by, or immediately available to, the property owner, and (5) the fee or charge may not be imposed for a general governmental service (such as police, fire, or library services) if the service is available to the public at large in substantially the same manner as it is to property owners. (§ 6, subd. (b)(1)-(5).) Walker's lawsuit alleges that the four-tier rate structure violates three of the foregoing requirements: The higher rates for the upper tiers mean that the District receives more from the higher paying customers than what is required to recover the District's costs of service (§ 6, subd. (b)(1)), the revenues the District collects are used for purposes other than that for which the fees were imposed (§ 6, subd. (b)(2)), and the inequality between the rate tiers is unrelated to the proportional cost of the service attributable to each parcel (§ 6, subd. (b)(3)).

The District asserts that Walker failed to participate in the hearings held on its rate increases in 2011 and 2012, and the District claims that this failure is fatal to her claim because "[p]articipation in the public hearing is the centerpiece of Proposition 218's procedural requirements applicable to rate-payers." This is presumably a reference to section 6, subdivision (a)(2), which provides that at a public hearing on proposed rate increases, "the agency shall consider all protests against the proposed fee or charge" and that if "written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge." Assuming without deciding that a ratepayer must attend a hearing and protest a proposed increase before challenging it, that has no bearing on the controversy before us. As *Plantier* observed, "it is not even clear that the present controversy falls within the purview of subdivision (a)(2) of section 6, inasmuch as the subject of the instant case involves whether [the] District complied with one (or more) of the *substantive* requirements of section 6 . . . set forth in subdivision (b) of this section, in calculating [water rates based on tiers of usage], as opposed to the imposition of, or increase in, any

proposed 'fee or charge' that is the subject of subdivision (a) of this section." (*Plantier, supra,* 12 Cal.App.5th at p. 867.) "[T]he administrative remedy in subdivision (a)(2) of section 6 is limited to a protest over the imposition of, or increase in, rates for water . . . fees, as opposed to protests over whether [the] District complied with the substantive requirements of subdivision (b) of this section." (*Id.* at p. 868.)

Plantier concluded that even if a challenge to the substantive requirements of section 6, subdivision (b), required a plaintiff to exhaust the administrative remedies set forth in section 6, subdivision (a)(2), those administrative remedies were inadequate under the facts of the case. (*Plantier, supra,* 12 Cal.App.5th at p. 868.) In that case, the water district provided services to about 40,000 people, or about 6,900 parcel owners, and 12 or fewer people challenged the fees or charges at issue for the three previous years, and only two of those protests were aimed at the substantive requirements that were the subject of the lawsuit. (*Id.* at pp. 859, 868-869.) Thus, it "would have been nearly impossible during th[o]se years for plaintiffs to obtain 'written protests' from a 'majority' of parcel owners in order to trigger the primary administrative remedy set forth in subdivision (a)(2) of section 6—rejection of the imposed or increased fee or charge." (*Id.* at p. 869.) "Without the administrative remedy that requires a 'majority' of parcel owners to protest in writing to the proposed 'fee or charge,' a parcel owner is left solely with the right to 'protest' the proposed 'fee or charge.' Although subdivision (a)(2) *requires* the agency to 'consider all protests' at the public meeting, . . . merely having an agency consider a protest—without more—is insufficient to create a mandatory exhaustion requirement." (*Id.* at p. 870, and cases cited therein.) The same is true here. Even if Walker had attended the public hearings addressing the 2011 and 2012 rate increases, the District would have been obligated to do no more that "consider" her "protest[]" (§ 6, subd. (a)(2)), which is insufficient to create an exhaustion requirement. (*Plantier,* at p. 870.)

In a related argument, the District argues that *Plantier* is distinguishable because that court found that it would have been implausible for a majority of parcel owners to provide written opposition to the challenged charges under section 6, subdivision (a)(2),

since plaintiffs were commercial business owners who made up only about 15 percent of parcel owners. (*Planter*, *supra*, 12 Cal.App.5th at p. 870.) The District contends that by contrast here, because more than 92 percent of its customers are residential, it would be possible for a majority to trigger the administrative remedy of section 6, subdivision (a)(2). But this possibility is not determinative. The process set forth in section 6, subdivision (a)(2), is different from a traditional administrative remedy in which a plaintiff is given an opportunity to pursue relief from an agency, which has the discretion to grant it in whole or in part and thereby eliminate the need for or the scope of an ensuing lawsuit. In contrast, under section 6, subdivision (a)(2), the agency has no administrative discretion; if a majority of parcel owners provide written opposition, the agency is simply categorically precluded from extending, imposing, or increasing a fee. (§ 6, subd. (a)(2).) This process is more properly viewed as an alternative way for ratepayers to stop a fee's extension, imposition, or increase than as a pre-judicial occasion for the agency to exercise its discretion to decide whether to stop a fee's extension, imposition, or increase.

The District places great weight on *Wallich's Ranch Co. v. Kern County Citrus Pest Control Dist.* (2001) 87 Cal.App.4th 878 (*Wallich's Ranch*), but we agree with *Plantier* that *Wallich's Ranch* is inapposite. (*Plantier*, *supra*, 12 Cal.App.5th at p. 872.) *Wallich's Ranch* involved a challenge to an assessment imposed under the Citrus Pest District Control Law (Food & Agr. Code, § 8401 et seq.). (*Wallich's Ranch*, at p. 880.) The citrus grower in that case was barred from challenging those assessments because the grower had failed to exhaust administrative remedies by challenging the county pest control district's budget before challenging citrus-pest-control assessments for three fiscal years. (*Id.* at pp. 883-884.)

The water district in *Plantier* relied on *Wallich's Ranch*, as the District relies on it here, to argue that the plaintiff had not exhausted administrative remedies. But *Plantier* found this reliance to be misplaced for four reasons: (1) *Wallich's Ranch* did not impose an exhaustion requirement under Proposition 218, (2) the pest control law was a comprehensive legislative scheme distinguishable from Proposition 218, (3) the pest

control law expressly required a district to hold an annual budget hearing to institute a budget hearing, as opposed to section 6, which does not require such an annual meeting, and (4) *Wallich's Ranch* involved a challenge to the amount assessed, as opposed to a substantive challenge to the method of calculating the assessment. (*Plantier, supra,* 12 Cal.App.5th at pp. 872-874.) The District here argues at length that we should follow *Wallich's Ranch*, but we find it inapposite for the same reasons set forth in *Plantier*.

The District also argues that *Plantier* was incorrectly decided, a question that our Supreme Court will soon decide. We elect to follow the case, and we therefore affirm the trial court's decision that Walker's lawsuit is not barred by a failure to exhaust administrative remedies.

III.
DISPOSITION

The trial court's order granting a new trial is affirmed. In light of our decision, we dismiss Walker's cross-appeal as moot. Walker shall recover her costs on appeal.

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Humes, P.J.

WE CONCUR:

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Margulies, J.

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Banke, J.